

Before the
FEDERAL COMMUNICATION COMMISSION
Washington D.C. 20554

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 05-338
The Junk Fax Prevention Act of 2005)	
)	
Comments by Westfax, Inc. in Support of the JFPA)		

TO: The Federal Communications Commission ("FCC")

From: Westfax, Inc.
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Westfax, Inc. respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") wherein the FCC asks for comments on the proposed facsimile advertising rules.

The FCC is required to issue such rules consistent with the Junk Fax Prevention Act of 2005 ("JFPA"). The JFPA was passed July 9, 2005. The JFPA requires such rules to be in place by April 5, 2006. The purpose of this letter is to outline Westfax, Inc.'s comments to the FCC.

**THE TELEPHONE CONSUMER PROTECTION ACT OF 1991("TCPA")
PROHIBITS SENDING UNSOLICITED FACSIMILE ADVERTISEMENTS
TO RECIPIENTS WITHOUT THEIR PRIOR EXPRESS INVITATION OR
PERMISSION**

**AN "ADVERTISEMENT" IS ANY MATERIAL ADVERTISING THE
COMMERCIAL AVAILABILITY OR QUALITY OF ANY PROPERTY,
GOODS OR SERVICES**

**THE TCPA GRANTS A PERSON OR ENTITY WHO RECEIVES AN
UNSOLICITED FACSIMILE ADVERTISEMENT THE RIGHT TO SUE THE
ADVERTISER FOR \$500 IN DAMAGES FOR EACH VIOLATION**

**IF THE SENDER WILLFULLY OR KNOWINGLY VIOLATES THE TCPA
THEN IT IS WITHIN THE COURT'S DISCRETION TO AWARD TREBLE
DAMAGES FOR EACH VIOLATION**

THE JFPA EXPRESSLY ALLOWS SENDERS TO FAX UNSOLICITED ADVERTISEMENTS TO RECIPIENTS THEY HAVE AN EBR WITH

The JFPA expressly recognizes and codifies an “established business relationship” exception to the general prohibition of unsolicited facsimile advertisements without express invitation or permission.

The FCC proposes to use the definition that applied to telephone solicitations that was in effect on January 1, 2003

EBR is a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity (within the **eighteen (18) months** immediately preceding the date of the telephone call (fax) or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the **three (3) months** immediately preceding the date of the call) which relationship has not been previously terminated by either party

Proposed time period is in parentheses

This is different than the telephone EBR in that for faxes the definition of an EBR includes a relationship between a person or entity and a business subscriber subject to the same terms applicable between a person or entity and a residential subscriber

This is due to the fax that the TCPA unlike telephone solicitation rules applies to both business and residential subscribers. The TCPA and JFPA likewise should only apply to residential subscribers. Businesses have different interests and lesser privacy concerns

AFTER THE DATE OF THE JFPA, IN ORDER TO RELY ON THE EBR EXEMPTION, THE SENDER MUST OBTAIN THE FAX NUMBER VOLUNTARILY FROM THE RECIPIENT OR FROM A DIRECTORY, ADVERTISEMENT OR INTERNET SITE THE RECIPIENT VOLUNTARILY AGREED TO MAKE ITS FAX NUMBER AVAILABLE FOR PUBLIC DISTRIBUTION

THE UNSOLICITED ADVERTISEMENT MUST ALSO CONTAIN A NOTICE OF AN OPT OUT OPPORTUNITY

1. CLEAR AND CONSPICUOUS ON FIRST PAGE OF THE FACSIMILE
2. RECIPIENT MAY REQUEST SENDER NOT TO FAX ANY FUTURE UNSOLICITED ADVERTISEMENTS TO THE SENDER
3. SENDER MUST INCLUDE A COST-FREE CONTACT TELEPHONE NUMBER AND FAX NUMBER FOR THE RECIPIENT TO SEND SUCH REQUEST TO AT ANY TIME ON ANY DAY OF THE WEEK

THE RECIPIENT'S REQUEST TO OPT OUT MUST

1. IDENTIFY THE NUMBERS NOT TO FAX TO
2. BE MADE TO THE NUMBER(S) PROVIDED BY THE SENDER
3. THE REQUEST MAY (OR MAY NOT) GO AWAY IF THE RECIPIENT PROVIDES EXPRESS INVITATION OR PERMISSION AGAIN

The JFPA value lies in its simplicity, clarity and ease of application. Rules and guidelines should be kept to a minimum. The JFPA and the TCPA collectively prohibit facsimile advertisements without prior express invitation or permission (including a well defined situation where a business relationship exists). Specific contact information is required on each facsimile as well as an opt out provision. If there is any question as to ability of the sender to send a facsimile advertisement, the recipient has a simple, cost-free, anytime "do not fax" mechanism to correct the situation

THE JFPA ALSO GIVES THE FCC AUTHORITY TO LIMIT THE DURATION OF THE EXISTENCE OF A EBR IN THE CONTEXT OF UNSOLICITED FACSIMILE ADVERTISEMENTS

1. BEFORE THE FCC MAY LIMIT THE DURATION OF AN EBR THEY HAVE TO FIND THIS IS A PROBLEM
 - a. Has an EBR Exemption resulted in a significant number of complaints to the FCC
 - b. Do any of the complaints involve a longer EBR than 18 months
 - c. Evaluate costs to senders to establish EBR within a time period and benefits to recipients
 - d. Determine if cost is unduly burdensome to small businesses

THE FCC IS ALSO GOING TO STUDY THE ISSUE AND ISSUE AN ANNUAL REPORT REGARDING JUNK FAX ENFORCEMENT

Westfax, Inc. is unaware of any complaints regarding the duration of the EBR and objects to limiting the duration of an EBR. The definition of an EBR clearly enables any person to determine whether such a relationship exists and the opt out provisions enable any recipient to terminate any such relationship at any time and for any reason. Before any limitations are adopted, further study is necessary.

Is there an unsolicited facsimile advertising problem. The preliminary issue is whether there really is a “problem” that the TCPA/JFPA regulates and resolves in the least restrictive manner. Facsimile advertising is lawful and an established means of communication and advertising. It is beneficial, effective, inexpensive, convenient and prompt. Governmental regulation is to be used sparingly and should not create an unnecessary burden particularly on small businesses.

The FCC differentiates between businesses and individuals (particularly on telemarketing). The TCPA/JFPA is not necessary particularly for facsimile advertisements to businesses. The costs and nuisances originally advanced for regulation of facsimile advertisements are no longer present due to improvements in fax machines and technological advances (e.g. e-faxes). Computers, not fax machines, now receive a substantial amount of faxes. Faxes can be stored and viewed prior to printing, paper is not involved and a question arises whether the transmission to a computer is actually a facsimile advertisement or an email/efax. A similar question is whether the fax is sent to a “telephone facsimile machine” – does a computer that receives an efax “have the capacity to transcribe text or images from an electronic signal received over a regular telephone line onto paper”. Is the computer even hooked up to a regular telephone line or is it a cable or other high speed connection (or wireless).

If there is a “problem” to what extent does the TCPA/JFPA regulate and resolve the problem. Are less restrictive measures available to regulate and resolve the “problem”.

A “national do not fax list” a la the national do not call list (residential only) may be the best answer currently available. Faxing to businesses would be allowed unless an opt out notice was received. The telephone law is in place and works. The means of establishing, maintaining and enforcing a do not call list are already in place and could largely be duplicated for fax numbers. The TCPA/JFPA expressly contemplates this with the new “opt out” and “do not send future faxes” notice provisions.

This or a similar less restrictive global solution eliminates or substantially reduces the need for exceptions and guidelines interpreting the TCPA/JFPA.

What problems does the TCPA/JFPA create or contribute to and what problems does the FCC create or contribute to in interpreting and enforcing the TCPA/JFPA.

The TCPA/JFPA and the FCC have not adequately corrected abuses of the legislation by various states and attorneys. The primary issues are federal preemption of state laws and the attempts by lawyers to improperly use the TCPA/JFPA for their benefit and file countless lawsuits and clog up the courts.

1. Federal Preemption. There are 30+ state statutes regulating unsolicited facsimile advertisements. California has a new statute that applies to facsimile advertisements sent to and from California (interstate communication) as opposed to facsimile advertisements within California (intrastate communication). California also makes it a criminal act to violate its statute. Many other states have requirements that are different from the TCPA/JFPA. This situation makes it very difficult and costly for senders and recipients to understand the laws and comply with them. Congress clearly gave the federal government exclusive authority to regulate interstate commerce and communication. In addition, some states add additional damages, fines, penalties and costs (including attorney fees) to the damages already provided by the TCPA. The FCC and the federal courts need to rule quickly that state statutes (other than for intrastate communication) need to be consistent with and cannot impose different or harsher provisions than the TCPA/JFPA or add additional penalties and damages.
2. Assignment. The TCPA/JFPA did not expressly state whether its claims were assignable or not. Companies and lawyers now “purchase” faxes for a nominal amount and sue as assignees of the alleged unsolicited facsimile recipients. Buying litigation or champerty has been in disfavor for decades. Several courts have ruled that the TCPA/JFPA cause of action sounds in tort (invasion of privacy) and not in contract. Further, the strict liability and damage provisions are penal in nature. As a result, such claims are not assignable. Congress and the FCC need to clearly rule a violation of the TCPA/JFPA inures solely to the fax recipient and is not assignable. Further, to keep the alternate practice of debt collection attorneys suing on a contingent fee basis, Congress and the FCC need to re-confirm that the TCPA/JFPA does not provide for attorney fees and contingent fees arrangements should not be permitted for alleged TCPA/JFPA cases.

3. Class Actions. Similar to assignment of claims cases, lawyers are attempting to obtain large fees by bringing class action lawsuits against senders of facsimile advertisements alleging the data (list) used “is the class”, the recipients are similarly situated and class action procedure is appropriate for alleged TCPA/JFPA cases. There is no proof a recipient even received an unsolicited fax. Relief and money are not generated for the class because they cannot be located or identified and they do not come forward. Federal and state courts have ruled differently on this issue and the fact patterns in the rulings have also been different. The TCPA/JFPA involves a sender and a recipient. Lists do not prove recipients received facsimiles for many reasons including opt out notices and success rates for senders of facsimiles are typically less than 70%. Modern technology dissects advertisements sent by facsimile into traditional facsimiles the TCPA contemplated and efaxes that are not actually faxes at all. There are many issues that create mini trial issues that may negate class action status. In any event, the TCPA/JFPA did not intend or provide for class action lawsuits. In fact, it provided for individual lawsuits by recipients of unsolicited facsimile advertisements and anticipated such recipients would file their lawsuits in small claims court. Congress and the FCC intended that the simplicity and strict liability of the TCPA would enable recipients to pursue their claims without an attorney. Congress and the FCC need to re-confirm that the TCPA/JFPA does not provide for class action lawsuits and that the TCPA/JFPA makes adequate provisions for individual recipients.
1. The FCC seeks comment on the removal of its earlier rule that a “facsimile advertisement is unsolicited unless the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed written statement that *** clearly indicates the recipient’s consent to receive such facsimile advertisements from the sender”.
 - a. The removal is a great idea and appropriate given the fact that such rule was and is clearly inconsistent with the intent of Congress and the TCPA and now the JFPA laws (the nature of the creation of this rule was suspect anyway)
 - b. Congress intended that permission could be obtained other than by a signed, written statement.
2. The FCC seeks comments on whether the FCC should establish parameters defining what it means in the EBR context for a person to “voluntarily agree to make a facsimile number available for public distribution”

- a. Should the sender bear the burden to establish that the recipient has agreed to make the number publicly available
 - i. NO The fact that the sender has the facsimile number creates a rebuttable presumption that the number was made publicly available and shifts the burden of going forward to the recipient
 - ii. The recipient owns and controls the dissemination of the number
 - iii. The recipient can easily opt out of receiving such facsimiles
- b. When the sender obtains the facsimile number from a directory, advertisement, or site on the Internet, should the sender be required to make reasonable efforts to confirm with the entity that compiled the numbers that the recipients have “voluntarily” agreed to allow them to be made publicly available
 - i. NO A sender should not have to “make reasonable efforts” (whatever that may mean) to confirm with the person who compiled the numbers that the recipient voluntarily agreed to make his number publicly available.
 - 1. If an EBR exists, the JFPA clearly says a sender may then send a facsimile advertisement to the recipient until the EBR expires or the recipient gives the sender a do not fax notice.
 - 2. In an EBR situation the issue of voluntarily agreeing to make the number publicly available is not as relevant and an EBR clearly shifts the burden to the recipient
 - 3. Facsimile numbers are generally public unless the recipient takes steps to make them private. The great majority of fax numbers are presently publicly available and few, if any, people make efforts to cause their fax numbers to be unavailable
 - 4. The TCPA/JFPA gives the recipient the ability to protect itself and remove its facsimile number from future facsimiles
 - 5. The sender may not know how or who to contact for such information
 - 6. The persons compiling the numbers has no duty to ascertain whether the recipient voluntarily wishes to make the number available and he may not know whether they were “voluntarily” obtained

7. The status of voluntary obtained may change at any time and change back and forth as well
- c. An exception exists for the EBR Exemption requirement of how a facsimile number was obtained for EBR's in existence prior to July 9, 2005 if the sender had the recipient's facsimile number before such date (in such case the sender is NOT required to demonstrate how it obtained the facsimile number). The FCC seeks comment on how it should verify this
 - i. The FCC can verify the existence of an EBR formed prior to July 9, 2005 and the receipt of a facsimile number in the same manner it does now - on a facts and circumstances basis. The definition of an EBR permits this determination
- d. The FCC also seeks comment on what the sender needs to have and keep as records to verify this if a complaint is filed involving the existence or duration of an EBR.
 - i. The sender should not have to keep records (there is no record requirement now)
 - ii. This would all be part of the facts and circumstances analysis.
 - iii. If a recipient of a facsimile advertisement sent pursuant to a pre July 9, 2005 EBR does not wish to receive future facsimile advertisements, a provision to opt out is provided in the JFPA.
 - iv. The issue of pre and post July 9, 2005 quickly becomes irrelevant.
3. The FCC proposes to adopt the requirements in the JFPA regarding making a **request to not to receive future unsolicited facsimile advertisements**.
 - a. The FCC seeks comments as to whether the do not fax requests **terminates the EBR exemption with the sender of the facsimile even if the recipient continues to do business with the sender.**
 - i. The existence of an EBR should be decided on the basis of the content and timing of the notice given
 1. If the recipient makes it clear in the notice "do not fax even if we do business subsequently", the sender should honor the request
 2. If the recipient says a fax may occur if we subsequently do business or the recipient is silent

or does not make it clear then the sender may rely on the EBR exemption

- b. The FCC also seeks comment on whether to specify that if the sender of the facsimile advertisement is a **third party agent or fax broadcaster** that any do not fax request sent to “that sender” will extend to the underlying business on whose behalf the fax is transmitted
 - i. The existence of a third party agent or fax broadcaster does not change the express requirements of the law. The third party agent or fax broadcaster is not responsible under the TCPA/JFPA to accept, retain or communicate such information nor is the third party agent or fax broadcaster disclosed in the facsimile advertisement. The third party agent or fax broadcaster does not assume any such duties or responsibilities
 - ii. The sender must provide specific information and the notice must be made by the recipient to the sender as required by the express provisions in the JFPA (and not to anyone else)
- c. The FCC also seeks comment on whether there any other methods of communicating a do not fax request
 - i. The do not fax request provisions were carefully created;
 - ii. A sender should not be required to honor a request that does not meet the express JFPA requirements (e.g. mail, email) in the opt out notice
 - iii. The opt out notice provisions are clear and concise on the procedure to opt out and do not provide for any other options
 - iv. Serious consequences could befall senders if the requirements were not so clear and concise
 - v. A sender may always voluntarily comply
- d. The FCC seeks comments on situations in which a **consumer** has made a do not fax request of a sender and **subsequently provides express invitation or permission to receive facsimiles from that entity**. Specifically, should the facsimile sender bear the burden of proof to demonstrate that it had the consumer’s express invitation or permission to send the advertisement by facsimile.
 - i. If a sender alleges such permission after a do not fax request, the issue should be determined like any other TCPA/JFPA claim without regard to the prior do not fax request

- ii. This is the same situation as where a recipient continues to do business with the sender after the notice
 - iii. If the recipient voluntarily makes a do not fax request to a sender and then the recipient subsequently provides express invitation or permission to send facsimiles, then the request should be cancelled. If the recipient wishes to make another do not fax request then he or she may do so. The JFPA does not preclude multiple requests.
 - iv. If invitation or permission exists (including an EBR) and while it exists and has not been properly revoked or expired, senders may send facsimile advertisements to such person pursuant to the JFPA.
 - v. A sender of a facsimile advertisement should have a consistent obligation to demonstrate that it complied with the TCPA/JFPA and where applicable, that it had the prior express invitation or permission (including an EBR) to send the facsimile advertisement at the time it was sent without distinction as to whether the recipient had previously sent a do not fax request and regardless of whether such request was subsequently rescinded, cancelled, revoked or modified.
 - e. The FCC seeks comments on what records would need to be kept in the usual course of the sender's business to evidence that subsequent express invitation or permission was provided by the recipient
 - i. The sender should not have to keep records (there is no reporting requirement now)
 - ii. This would all be part of the facts and circumstances analysis.
4. The FCC **proposes to incorporate into the facsimile advertising rules the definition of an EBR** (see above)
- a. The FCC seeks comments on whether to incorporate the EBR definition
 - i. Yes, the FCC should incorporate the above definition of an EBR
 - b. The FCC also seeks comments on **whether to limit the duration of an EBR** as applied to unsolicited facsimile advertisements
 - i. First, the FCC will evaluate its complaint data to see if the EBR exception resulted in a significant number of

complaints and whether such complaints involved a longer EBR

- ii. With telephone solicitations Congress has concluded that the right to call consumers becomes more tenuous over time
 - iii. Thus the 18 month time limit following a purchase and 3 months after an application or inquiry for telephone (a balance between industry practice and consumers privacy interests)
 - iv. Thus the proposal to limit the EBR for unsolicited facsimile advertisements in the same manner
 - v. If comments wish to suggest varying the time period (or no time period) empirical evidence is requested to distinguish the fax situation from the telephone situation
 - 1. There is no need or justification to limit the duration of an EBR and impose a burden on recipients to keep a clock and perform calculations on each recipient
 - 2. Recipients may allege the non-existence of an EBR in a claim or simply provide an opt out notice
- c. The FCC also seeks comments on the benefits to facsimile recipients of limits on the EBR. Are there direct costs to facsimile recipients (paper, toner, time). Are there direct benefits of no limitations.
- i. There are no marginal additional benefits to recipients from a limited duration EBR. Recipients may keep the EBR open or opt out and terminate the EBR at any time and for any reason (or no reason)
 - ii. The direct costs to recipients, if any, are nominal
 - iii. The cost to senders of demonstrating the existence of an EBR that is limited in duration is unnecessary and overly burdensome

5. The FCC proposes amending the facsimile advertising rules to comply with the **new JFPA notice requirements**

- a. The FCC seeks comment on whether it needs rules or examples for defining **what is “clear and conspicuous”**
 - i. No the term is commonly used in many contexts and well understood

- b. The FCC also seeks comment on whether 30 days is the “shortest reasonable time” to give the sender to comply with the notice not to send future facsimile advertisements.
 - i. The telemarketing sales rules require honoring a do not call request within a reasonable time. The FCC says this time period may not exceed 30 days from the date of such request.
 - ii. If 30 days is not appropriate, the FCC seeks empirical evidence to support longer or shorter proposals
 - 1. A notice requirement is “content” that the senders can provide with the facsimile advertisement. The notice requirement can be standardized.
 - 2. 30 days from the date of the request is reasonable
- 6. The TCPA requires senders of facsimile messages to identify themselves on the message along with the telephone number of the sending machine or the business or person’s number sending the message.
 - a. The FCC seeks comment on the interplay of this identification requirement and the new opt out notice requirements
 - i. How can the burden of complying with these separate requirements be minimized
 - 1. Minimize the information required
 - 2. Standardize the identification and opt out requirements so they may be automatically “stamped” on all facsimile advertisements
- 7. The FCC seeks comments on whether it needs to “enumerate specific cost free mechanisms” for a recipient to transmit a do not fax request and if so what they would be (toll free number, local number, web site, email address, etc.)
 - a. A list of the obvious “cost free mechanisms” could be provided
- 8. The FCC is considering exempting non-profit organizations from the notice requirements. Specifically, the FCC may allow professional or trade organizations that are tax exempt non profit organizations to send unsolicited advertisements to their members in furtherance of their tax-exempt purpose that do not contain the notice requirements.
 - a. The FCC seeks comment on whether to allow such organizations to send unsolicited advertisements to their members that do not contain the opt out notice. Is such notice necessary for the members’ protection.

- i. The notice is short, standardized and easy to put into the content of any facsimile sent to a recipient
 - ii. The opt out notice should be included on all facsimile advertisements
- 9. The FCC states its rules on the sending of unsolicited facsimile advertisements would apply to any entity, “including any telecommunications carrier that uses the telephone facsimile machine to advertise”.
 - a. The FCC says the rules could have a substantial impact on small entities including interexchange carriers, incumbent local exchange carriers, wireless service providers
 - b. The FCC further says “it ordinarily does not seek comment on the entities that must comply with the proposed rules. However, the proposed rules in this document potentially could apply to any entity including any telecommunications carrier that sends an unsolicited advertisement to a telephone facsimile machine”.
 - i. There is nothing in the JFPA that would cause the FCC to make these statements or imply that new responsibilities or liabilities existed for any other person than the advertiser.
 - ii. The FCC needs provisions to make it clear that the provisions do not impose any responsibility or liability on any other party other than the advertiser
 - 1. Specifically there are no new requirements or liability imposed upon carriers including fax broadcasters
 - 2. The TCPA/JFPA did not mention or contemplate changing the law and regulations for any other party other than the advertiser and recipient.

Respectfully Submitted

WESTFAX, INC.